

1 attention away from the proof of criminality in October by  
2 emphasizing the trades that Jeffries & Company engaged in the

1 Cir.)(same), cert. denied, 111 S. Ct. 273 (1990).

2 C. Testimony of James Melton.

3 James Melton, the chief trader at Jefferies & Company, was a  
4 key witness for the prosecution. Melton testified that Boyce  
5 Jefferies instructed him to support the price of Union Carbide stock  
6 at \$22.00 per share on October 29, 30 and 31. Further, Melton  
7 testified that on each of these days he placed a telephone call  
8 shortly after the close of the Pacific Stock Exchange from Jefferies  
9 & Company's Los Angeles office to Sherwin's office at GAF. There  
10 was no record of these telephone calls over Jefferies & Company's  
11 conventional phone lines, but the parties stipulated that Jefferies  
12 & Company had fifteen outbound WATS lines for long-distance calling  
13 in its Los Angeles office. These calls, Melton said, were made  
14 pursuant to Jefferies' instructions to inform Sherwin of Union  
15 Carbide's closing price and the number of shares that Melton had  
16 purchased. On one of these three days, Melton recalled, Sherwin was  
17 not available but promptly returned the call.

18 After the close of the government's case, the defendants were  
19 surprised to discover that the telephone company maintained the  
20 records of calls placed on WATS lines. The defendants introduced  
21 these records, which provided no indication of the calls to Sherwin  
22 that Melton had claimed to have made. Defense counsel argued  
23 vigorously in summation that it had been proven that Melton  
24 testified falsely. On rebuttal, the government countered by argu-

1 that Melton, testifying pursuant to a cooperation agreement, had no  
2 motive to lie. The government concluded this portion of its  
3 argument as follows: "Now, the calls from James Melton to James  
4 Sherwin do not show up on the A T & T WATS records, but there is too  
5 much evidence from too many sources for these calls not to have  
6 happened."

7 Conceding that they neither objected to the government's  
8 argument in this regard nor requested a curative instruction,  
9 defendants now contend that their convictions must be reversed  
10 because the government embraced demonstrably perjurious testimony.  
11 The defendants' position is not that the government deliberately  
12 elicited falsehoods, but that it should have renounced, rather than  
13 relied upon, Melton's testimony in light of the subsequently  
14 discovered telephone records.

15 Melton's testimony regarding the telephone calls was  
16 significant. It was the only evidence directly linking the alleged  
17 key operatives in the manipulative scheme. Indeed, Melton  
18 repeatedly testified that he recalled speaking with Sherwin only on  
19 the three days in October 1986, and that Sherwin merely replied  
20 "thank you" after Melton delivered his information.

21 Nevertheless, in view of the late discovery and introduction  
22 of the documentary evidence, and the framing of the issue in terms  
23 of credibility by all parties at trial, I discern no reversible  
24 error here.

1 I relate this history concerning Melton's testimony because  
2 I believe it relevant to further proceedings in this case on remand.  
3 Oral argument of this appeal included the following exchange  
4 concerning this matter:

5 JUDGE MAHONEY: Has there been any inquiry by  
6 the US attorney's office since  
7 the close of trial?

8 MR. LOEWENSON: Not of telephone companies.  
9 I want to be careful, but most  
10 important to be candid with the  
11 court. No inquiry has been  
12 made either of AT&T or of  
13 Pacific Bell or Jefferies.

14 JUDGE MAHONEY: Has any inquiry been made that  
15 would cast any light on the  
16 question whether there is an  
17 explanation for these phone  
18 calls not being in the records,  
19 other than their not having  
20 been made or there being some  
21 inexplicable errors in the  
22 records?

23 MR. LOEWENSON: No, your Honor. And I am not  
24 sure that further inquiry would  
25 be of assistance in determining  
26 the issues that are relevant  
27 today, namely, whether Melton  
28 deliberately committed perjury.

29 In view of the disposition of this appeal, the government  
30 will be faced with a very different issue that will be relevant  
31 tomorrow; whether to proceed with a fourth trial of this indictment,

1 investigation of this situation during the third trial. It did  
2 not preclude such an inquiry in the course of the appeal, and I  
3 candidly express my disappointment that the government felt no  
4 obligation to undertake one. In any event, it appears clear to me  
5 that the government is inescapably obliged to investigate fully the  
6 contradiction between Melton's testimony and the telephone records  
7 before again proffering Melton's testimony to the district court.

CERTIFICATE OF SERVICE

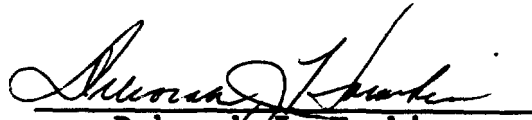
I, Deborah J. Hawkins, a secretary with the law firm of Cohen and Berfield, P.C., do hereby certify that on the 30th day of April, 1991, a copy of the foregoing, "Petition To Deny" was sent via first class mail, postage prepaid to the following offices:

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